

ITEM: 15

SUBJECT: Administrative Civil Liability (ACL) Complaint No. R5-2005-05-01, Hilmar Cheese Company, Inc. and its wholly owned subsidiary, Hilmar Whey Protein, Inc, Merced County

BOARD ACTION: *Consideration of a Proposed Order ratifying a settlement agreement regarding the proposed ACL Complaint.*

BACKGROUND: Hilmar Cheese Company, Inc. and its wholly owned subsidiary, Hilmar Whey Protein, Inc., (hereafter "Hilmar") are privately held California corporations that own and operate a Cheese Processing Plant (hereafter "Plant") about one-half mile north of the unincorporated community of Hilmar. Hilmar discharges cheese processing wastewater from the cheese pit and the lactose pit to the "Primary Lands," adjacent to the Plant. The discharge is regulated by Waste Discharge Requirements (WDRs) Order No. 97-206 and Cleanup and Abatement Order No. 2004-0722 (hereafter "CAO"). Since March 2001, Hilmar has also provided treated wastewater to other persons for irrigation of "Secondary Lands" near the Plant.

On 26 January 2005, the Executive Officer for the California Regional Water Quality Control Board, Central Valley Region issued Administrative Civil Liability (ACL) Complaint No. R5-2005-0501 to Hilmar Cheese Company, Inc. and its wholly owned subsidiary, Hilmar Whey Protein, Inc. The ACL Complaint alleges that (1) Hilmar's self-monitoring reports document 1,039 days of violation of the discharge effluent limit of 900 micromhos per centimeter ($\mu\text{mhos/cm}$) for EC prescribed by WDRs Order No. 97-206 for discharges to Primary Lands; (2) Hilmar's self monitoring reports document that on those 1,039 days, Hilmar discharged 821,000,000 gallons of wastewater to the Primary Lands; and (3) on those 1,039 days, Hilmar discharged waste or caused or permitted waste to be deposited where it was discharged into waters of the state. The ACL Complaint proposes that Hilmar pay a liability of \$4,000,000 (four million dollars).

Hilmar contends that 900 $\mu\text{mhos/cm}$ is an unprecedented standard; that Hilmar is required to treat its wastewater to a quality better than the drinking water that community water providers actually supply to the consuming public at the tap; that its wastewater is not toxic; and that for these and other reasons, the proposed administrative civil liability is excessive and should be eliminated or significantly reduced.

To avoid the expense and uncertainty of litigation, the Prosecution Staff of the Regional Board and Hilmar have reached a settlement, but before the settlement agreement is effective it must be approved and accepted by the Regional Board. As noted below, the settlement agreement and related documents have been posted on the Regional Board's website and are available to be downloaded by the public for review. (See Attachment I). The Regional Board has been asked to approve and accept the proposed settlement agreement, which among other things would resolve the issues set out in the complaint.

This summary was prepared by adjudicatory staff, and is not intended to represent the complete agreement. The Settlement Agreement itself contains all of the terms. The proposed Settlement includes the following components:

1. No admission of liability by Hilmar.
2. A one-time payment by Hilmar of \$1,850,000 to the State Water Resources Control Board, Waste Discharge Permit Fund, and \$150,000 to the Attorney General's office to defray its costs.
3. A one-time payment by Hilmar of \$1,000,000 to fund a Supplemental Environmental Project. This Supplemental Environmental Project consists of a study of the management of salinity in wastewater in the California food processing industry.
4. The Regional Board agrees to release and forego legal action against Hilmar for matters that are covered by the settlement agreement (with enumerated exceptions). The release and covenant not to sue applies to all "covered matters", which include: a.) all past and present violations of Hilmar's current Waste Discharge Requirements, Order No. 97-206, the Water Code, or the federal Clean Water Act that staff had knowledge of as of the date of the settlement ; and b.) any continuation or recurrence of the same known alleged violations after the date of the Settlement Agreement until the date that Hilmar receives final updated Waste Discharge Requirements.
5. A schedule for Hilmar to prepare monthly progress reports and a revised Report of Waste Discharge (by April 30, 2006) for submittal to the Board.
6. Interim Operating Limits pertaining to maximum daily discharge rates and concentrations with which Hilmar will comply while updated and revised Waste Discharge Requirements are being prepared and finalized.
7. Provisions that if Hilmar petitions the revised Waste Discharge Requirements, the challenged provisions shall not be considered final until the petition is fully resolved and no further right to appeal exists.
8. If Hilmar violates the Interim requirements, the covenant not to sue and the release are invalidated for those periods of time, and the Board may take enforcement action including civil liability.
9. The covenant not to sue and the release no longer apply after the Waste Discharge Requirements are revised and final, which means that all petitions and appeals, including any by Hilmar, are resolved and no further right to petition or appeal exists.
10. Regional Board may seek injunctive relief or issue administrative Orders but waives ability to seek civil liability for future violations of the Cleanup and Abatement Order No. R5-2004-0722.
11. Hilmar retains its claim and right to litigate the issues regarding the Basin Plan, Merced Superior Court No. 148824 or any litigation that maybe filed in relation to the State Board's dismissal of Hilmar's Petition, State Board Order No. A-1717.

The Regional Board will consider the settlement, and it may consider whether to re-establish the procedural schedule and re-schedule the hearing on the ACL Complaint if the settlement is not accepted. This is not intended to be a hearing on the merits of the ACL Complaint. The Regional Board may:

1. Accept & approve the settlement;
2. Disapprove the settlement with some direction or suggestions to prosecutorial staff; or
3. Disapprove the settlement and re-establish the procedural schedule and reschedule the hearing.

[TRP1] ISSUES:

- Should the Regional Board accept the proposed settlement, Attached are the proposed Order, prepared by the adjudicatory team and the proposed Order prepared by the Parties,
- Should it provide instructions to prosecution staff to revise the settlement, or
- Should it re-establish the procedural schedule and reschedule the hearing?

[TRP2]

Mgmt. Review _____

Legal Review _____

28/29 November 2005
Central Valley Regional Water Quality Control Board
Regular Board Meeting
11020 Sun Center Drive #200
Rancho Cordova